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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,  
*Petitioner,*  
v.  
METCALF & EDDY, INC.,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,  
NATIONAL LEAGUE OF CITIES, INTERNATIONAL  
CITY/COUNTY MANAGEMENT ASSOCIATION,  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
NATIONAL INSTITUTE OF MUNICIPAL LAW  
OFFICERS, U.S. CONFERENCE OF MAYORS,  
NATIONAL ASSOCIATION OF COUNTIES,  
AND NATIONAL GOVERNORS' ASSOCIATION  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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### **QUESTION PRESENTED**

Whether an order of a federal district court denying a claim of state sovereign immunity is a collateral final order from which an interlocutory appeal may be taken.

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**INTEREST OF THE AMICI CURIAE**

*Amici*, organizations whose members include state, county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case features an issue of paramount concern to *amici*: the constitutional principle of state sovereign immunity and the willingness of federal courts to guard effectively against encroachments on that immunity.

Equating the Commonwealth of Puerto Rico's immunity to that of a State, the First Circuit addressed the issue of appellate jurisdiction presented by this case as if it involved a claim by a State. It then proceeded to mischaracterize the interest represented by state sovereign immunity as merely a protection of the States' treasuries from damages awards. That myopic approach to state sovereign immunity misconceives and denigrates the role of state sovereignty within our federal system. Sovereign immunity, as the term implies, is based upon recognition of the States' continued sovereignty within the Union and the immunity from suit that a sovereign customarily enjoys.

District courts will, upon occasion, err in construing claims of sovereign immunity, resulting in the wrongful denial of such claims. If denied a right of immediate appeal in those circumstances, States—which as a matter of constitutional principle cannot be haled unwillingly before the federal courts—will nonetheless be compelled to submit to pretrial procedures and ultimately stand trial in those courts.

For the reasons set forth more fully below, that result is neither compelled nor permitted by 28 U.S.C. § 1291 (1976), the statute governing appeals from district court orders. The straightforward application of established principles under that statute requires the federal courts of appeals to allow a State to vindicate its sovereign interest in avoiding trial at the outset, without having first to stand trial in order to do so. For this reason, *amici* submit this brief to assist the Court in its resolution of the case.<sup>1</sup>

### STATEMENT

Petitioner, the Puerto Rico Aqueduct and Sewer Authority ("the Authority") is a Puerto Rico public corporation and "an autonomous government instrumentality

<sup>1</sup> The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.

of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 22 § 142. The Authority provides drinking water and wastewater treatment throughout Puerto Rico, a task designated by statute as "an essential government function." *Id.* This action arises from a contract that the Authority entered into with a private engineering firm, Metcalf & Eddy, Inc., for work on various Authority facilities.

Following an audit of Metcalf & Eddy invoices, and the withholding of certain payments by the Authority, Metcalf & Eddy filed suit in the United States District Court for the District of Puerto Rico, citing diversity of citizenship as the basis for jurisdiction. The suit claimed breach of contract and damage to business reputation. The Authority ultimately moved to dismiss, citing "its immunity from suit under the Eleventh Amendment to the United States Constitution."<sup>2</sup> The district court denied the motion, holding that "defendant is not entitled to Eleventh Amendment immunity in this case because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds." Cert. App. A9.

The Authority filed a timely notice of appeal. On September 25, 1991, the First Circuit entered an order dismissing the appeal for want of appellate jurisdiction (*Metcalf & Eddy v. Puerto Rico Aqueduct & Sewer Authority*, 945 F.2d 10 (1st Cir. 1991)), taxing costs of the appeal against the Authority. The court found that dismissal of the appeal was compelled by its prior ruling in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), which held that a State's claim of Eleventh Amendment immunity was not a claim of an "entitlement not to stand trial" and thus was not appealable as a "collateral order" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S.

<sup>2</sup> This characterization of the motion as raising a defense of "immunity from suit under the Eleventh Amendment" is the Authority's own, taken from the Authority's Petition for Writ of Certiorari at 5. As described below, *amici* believe that the defense being asserted is properly termed "sovereign immunity".

541 (1949). In deciding this issue, the First Circuit panel did not reach the merits of the Authority's immunity claim. 945 F.2d at 14 n.6.

### SUMMARY OF ARGUMENT

In a series of decisions beginning with *Abney v. United States*, 431 U.S. 651 (1977), this Court has recognized a defendant's right to take an immediate appeal from an order denying a defense that is properly understood as a "right not to stand trial." The Court has reasoned that denial of such a right is a "final decision" within the meaning of 28 U.S.C. § 1291 because the right at stake would be rendered ineffectual if the party asserting it had to wait until *after* trial to appeal an erroneous determination. The Court has applied this "collateral order" doctrine to claims of absolute and qualified immunity, both of which protect the party claiming the immunity from appearing in court at all to answer to the damages suit of a private party. Sovereign immunity has likewise long been understood to reflect a sovereign's prerogative not to be haled into court against its will.

To be immediately appealable under 28 U.S.C. § 1291, an order that does not finally resolve a claim must (1) conclusively determine the disputed question; (2) resolve an important issue distinct from the merits; and (3) be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In this case, the court of appeals held that the claim of "Eleventh Amendment immunity" asserted by the Authority failed the third part of this three-part test. In that court's view, state sovereign immunity merely limits the federal court's subject matter jurisdiction in order to protect state treasuries from damages awards—a protection that could be afforded just as effectively after trial as before.

The court of appeals made two basic errors in its approach to state sovereign immunity.<sup>3</sup> *First*, the court

<sup>3</sup> The court equated the claim of the Commonwealth of Puerto Rico to an "Eleventh Amendment" claim asserted by a State, and pursued

mistakenly focused on the specific jurisdictional limitation described in the Eleventh Amendment, and ignored the broader principle of state sovereign immunity which the Amendment helps to implement. That immunity predated the Constitution and survived its ratification; it was not created by limiting the jurisdiction of the federal courts. Sovereign immunity, as its name implies, is an attribute of the sovereign and an immunity from suit. It is no less an immunity than the qualified or absolute immunity possessed by certain government officials. It is, therefore, more than a matter of Eleventh Amendment "jurisdiction" and merits the same protection afforded qualified and absolute governmental immunity under the Court's "collateral order" case law.

*Second*, the court of appeals mistakenly viewed the States' conceded surrender of some *portion* of their sovereignty in forming the Union as a wholesale surrender of sovereignty and sovereign immunity. Although the elements of sovereignty which the States surrendered were important, the surrender of certain sovereign prerogatives did not change the character of what the States retained. Thus, the sovereign immunity that was retained remains an immunity from certain kinds of suits—an immunity of the kind that gives rise to a right of immediate appeal when denied by a district court.

In sum, a district court's denial of a constitutional claim of sovereign immunity, on grounds determinable apart from the merits of the action, is immediately appealable as an order "which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudi-

its analysis as if the Commonwealth were a State. The analysis in this brief is based on the same assumption.

cated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546.<sup>4</sup>

## ARGUMENT

### I. AN ORDER DENYING A CLAIM OF SOVEREIGN IMMUNITY FALLS WITHIN THE COLLATERAL ORDER DOCTRINE

Our federal structure is that of a Union of States that continue to enjoy, subject to the terms of the constitutional compact they created, a substantial measure of their historic sovereignty. See *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399-2400 (1991). Thus, within the federal system, claims of state sovereign immunity are of signal importance, for they reflect basic understandings of the respective roles of federal and state governments. States are not ordinary litigants. When a substantial claim of state sovereign immunity is presented, respect for the States’ sovereignty and for our constitutional scheme require that a district court address the claim at the outset, and, when necessary, have it determined conclusively before the case proceeds further. As shown below, the courts of appeals have been granted the statutory jurisdiction necessary to allow this to happen.

The jurisdiction of the courts of appeals over decisions of the district courts is governed by 28 U.S.C. § 1291, which provides that:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291. “Final decisions” are generally to be equated with final judgments that end the litigation on

<sup>4</sup> This case asks the Court to decide only that the denial of a claim of sovereign immunity is appealable as a collateral order. It does not require the Court to address questions, not decided by the court below, concerning the *bona fides* of petitioner’s claim of immunity and the completeness of the record needed to address the sovereign immunity claim in this case. Those issues should be remanded to the First Circuit for resolution.

the merits. *Catlin v. United States*, 324 U.S. 229, 233 (1945). Nonetheless, the Court has found immediately appealable a “small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546. To fall within this “small class,” an order must meet a three-part test. It “must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.” *Coopers & Lybrand*, 437 U.S. at 468; *Mitchell v. Forsyth*, 472 U.S. 511 (1985).<sup>5</sup>

Applying this test, the Court has held that denial of a Fifth Amendment claim of double jeopardy is immediately appealable. The Court has emphasized that one of the rights encompassed by that claim—a right not to stand trial a second time—would effectively be nullified if a defendant were compelled to stand trial before he might vindicate his right. *Abney*, 431 U.S. at 660. Following *Abney*, the Court held that an order denying a claim of absolute immunity asserted by the President (*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)), or based on the Speech and Debate Clause (*Helstoski v. Meanor*, 442 U.S. 500 (1979)), is immediately appealable as well. Most recently, the Court held that denial of a claim of qualified immunity, presented by motion for summary judgment and turning on an issue of law, is an appealable decision

<sup>5</sup> The “collateral order doctrine” has generally been applied to district court orders entirely distinct from the main claims and defenses which form the core of the lawsuit. *E.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (order relating to security); *Stack v. Boyle*, 342 U.S. 1 (1951) (excessive bail); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (certain orders assigning the costs of notice in class action); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (order vacating attachment); *Roberts v. United States District Court*, 339 U.S. 844 (1950) (order denying *in forma pauperis* status).

within the meaning of 28 U.S.C. § 1291. See *Mitchell v. Forsyth*, 472 U.S. 511.

As shown below, the district court order rejecting defendant's claim of sovereign immunity in this case falls squarely within the reach and reasoning of these decisions. Thus, petitioner's appeal should have been allowed.

**A. Because A Claim Of Sovereign Immunity Is Based On The Sovereign's Entitlement Not To Be Haled Before A Court Against Its Will, The Denial Of Such A Claim Is Effectively Unreviewable After Trial**

The last element of this Court's three-part test, and the one which formed the basis of the First Circuit's refusal to entertain petitioner's appeal, holds that the order in question must be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. In the sense most pertinent to the issue here, this means that the order must be one that "unless it can be reviewed before the proceedings terminate, it can never be reviewed at all." *Mitchell*, 472 U.S. at 525. An immediate appeal may be allowed under the *Cohen* collateral order doctrine where "the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (emphasis added) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)).

Each of the Court's cases upholding the right of appeal in such circumstances—*Abney*, *Nixon*, *Helstoski*, and *Mitchell*—turn on the Court's recognition that the defense being asserted was, in a meaningful sense, an entitlement not to be called before the court at all, that is, a right not to stand trial. Because such a right by its nature cannot "be effectively vindicated after the trial has occurred," *Mitchell*, 472 U.S. at 525, the Court found that the orders at issue involved rights "the legal and practical value of which" would be eviscerated unless an im-

mediate appeal were allowed. "[T]he critical question, following *Mitchell*, is whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988).

As the court below acknowledged, every other court of appeals to consider the question has had little difficulty recognizing that a claim of sovereign immunity falls comfortably within the reach of the *Abney* doctrine. Indeed, those courts have in the main taken that proposition as self-evident, recognizing that it is implicit in the very concept of "sovereign-immunity."<sup>6</sup> As the Second Circuit concluded in *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), in "the case of an absolute immunity such as that provided by the eleventh amendment, the essence of the immunity is the possessor's right not to be haled into court—a right that cannot be vindicated after trial."<sup>7</sup>

The court below reached a different conclusion, considering itself bound by the First Circuit's prior decision in

<sup>6</sup> *Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir. 1986); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir. 1989); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Corporate Risk Management Corp. v. Solomon*, 1991 U.S. LEXIS 15001 (6th Cir., July 2, 1991) ("The essence of an Eleventh Amendment claim is a right not to stand trial"); *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir. 1991); *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).

<sup>7</sup> The use of the term "immunity"—as in "sovereign immunity," "qualified immunity" or "absolute immunity"—connotes the kind of protection from suit with which the *Abney* line of cases is concerned.

To be sure, merely calling a defense an "immunity" does not necessarily mean that it confers absolute protection from trial. Indeed, as this Court's careful analysis of the immunity at stake in *Mitchell* confirms, the First Circuit was correct in declining to afford "the word 'immunity' [a] talismanic significance," under which "the mere incantation of the term, without reference to the nature and type of immunity involved," would confer a right to an immediate appeal. 945 F.2d at 13-14. The First Circuit erred, however, in declining to afford any significance to the understanding of the right being claimed as an immunity and, more particularly, in misconstruing the historic understanding of the term "sovereign immunity."

*Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987). In *Libby*, the court rejected the common wisdom that sovereign immunity is an immunity from suit, finding it "more akin to a bar for lack of federal subject matter jurisdiction." 833 F.2d at 406. The court went on to hold that "even assuming the [Eleventh Amendment] is properly characterized as an 'immunity' or even as an 'absolute immunity,'" the rationale of *Abney* and its progeny was inapplicable as the State suffered no special injury "because of the indignity" of being haled into court. *Id.* at 406. Reasoning that because a State may be subjected to suit for injunctive relief in a federal court under *Ex parte Young*, 209 U.S. 123 (1908), the First Circuit held that the State's sole interest under the Eleventh Amendment lay in the protection of its treasury from damages, not in avoidance of trial. Following *Libby*, the court below held that because a State's interest in avoiding the payment of damages "can be adequately vindicated upon an appeal from a final judgment," an order denying a claim of Eleventh Amendment immunity is not an appealable collateral order.

As shown below, the First Circuit (1) misconceived the nature of "Eleventh Amendment immunity" by deeming it merely jurisdictional, and (2) misunderstood the implications of the States' surrender of a portion—but not all—of their historic immunity when they entered into the Union.

**1. An Eleventh Amendment Defense Invokes Sovereign Immunity, Which Encompasses Not Merely A Limitation On District Court Jurisdiction, But Also A Sovereign's Right Not to Stand Trial**

The Eleventh Amendment is phrased in jurisdictional terms, as a limitation on the judicial power of the United States.<sup>8</sup> Its formulation parallels the jurisdictional grants

<sup>8</sup> Although members of the Court have disagreed on the scope of the Eleventh Amendment, there appears to be agreement that it reaches respondent's cause of action: a non-federal claim brought

to the federal courts found in Article III of the Constitution. But the First Circuit erred in characterizing the Authority's "Eleventh Amendment defense" as *simply* a jurisdictional defense, without regard to the rule of sovereign immunity which preceded and motivated it.<sup>9</sup>

What is frequently—and confusingly—referred to as an "Eleventh Amendment defense" or "Eleventh Amendment immunity" is not based upon the jurisdictional restriction set forth in the language of that Amendment. This Court's "Eleventh Amendment" jurisprudence focuses not on the Amendment's language or its immediate purpose, but on the broader, underlying principle of state sovereign immunity which it helped to reaffirm. As this Court recently explained, the Eleventh Amendment is invoked "not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system *with their sovereignty intact*." *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991) (emphasis added).<sup>10</sup>

by an individual under diversity jurisdiction. See, e.g., *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 310 (1990) (Brennan, J., concurring in part) ("[T]he Eleventh Amendment secures States only from being haled into federal court by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity.").

<sup>9</sup> In supporting its characterization of "Eleventh Amendment immunity" as jurisdictional, the First Circuit relied on an historical analysis by Professor Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1473-84 (1987). See *Libby*, 833 F.2d at 406. That analysis has been rejected by the Court as inconsistent with long-standing precedent about the meaning of state sovereign immunity. See *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487-88 (1987).

<sup>10</sup> Because of the widespread confusion about terminology, a claim of sovereign immunity is fairly raised by invoking the "Eleventh Amendment".

The difficulty with terminology is highlighted where the claim is asserted by the Commonwealth of Puerto Rico. For example, the court below said that "Puerto Rico is to be treated as a state for

As this Court has many times recalled, the Eleventh Amendment was intended to overcome *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III of the Constitution, by extending the judicial power to certain suits involving the States, was perforce an abrogation of state sovereign immunity. *E.g.*, *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring). The Amendment overturned this Court's ruling and thus restored the States' preexisting immunity in the only situation in which the grant of judicial authority to the U.S. courts had seemed by its terms to take it away—Article III's grant of subject matter jurisdiction to the federal courts in cases involving States.

The Court has frequently had occasion to recognize, however, that the Eleventh Amendment's focused jurisdictional language, suited to its immediate purpose, should not be allowed to obscure a more important underlying principle: that the States were sovereign when they joined the Union. As sovereigns they possessed and,

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Eleventh Amendment purposes." 945 F.2d at 11 n.1. *See also* *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Authority*, 744 F.2d 880, 886 (1st Cir. 1984) ("Eleventh Amendment, which deprives the federal courts of power to hear claims for damages against any of the United States, has been held to apply to Puerto Rico").

It would ordinarily be apparent that a provision of the Constitution that by its terms applies to the States, and which reflects a compact between and among the States, does not apply, in terms, to the Commonwealth of Puerto Rico (although Congress might expressly declare it applicable).

On the other hand, it is entirely appropriate to conclude, as this Court has held, that just as the States retained some measure of sovereign immunity in joining the Union, the United States has decided to respect some degree of sovereign immunity with respect to the Commonwealth of Puerto Rico. *See Porto Rico v. Rosaly*, 227 U.S. 270 (1913). *See also* *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 593-94 (1976) ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union"); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671-73 (1974).

within the constitutional structure, they continue to possess, an immunity from suit, except insofar as surrender of that immunity was a necessary corollary to their participation in the Union. Thus, wholly apart from "the letter of the Eleventh Amendment," it remains a "postulate" of the federal system that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'" <sup>11</sup> *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting *The Federalist* No. 81, at 487 (C. Rossiter ed. 1961) (A. Hamilton)). *See also* *Blatchford*, 111 S.Ct. at 2581.

To be sure, an immunity from suit possessed by a defendant ordinarily implies a correlative limitation on judicial power. It is thus fair to refer to an "Eleventh Amendment defense" as "jurisdictional" in the obvious sense that, as a result of the defense, the federal courts lack the power to entertain the case. *E.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99 & 99 n.8 (1984) ("a constitutional limitation on the federal judicial power" which "deprives federal courts of any jurisdiction"); *Ex parte New York, No. 1*, 256 U.S. 490, 497 (1921) ("the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State").<sup>12</sup> It

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<sup>11</sup> The most significant aspect of sovereignty surrendered by the States was in the form of powers granted to the federal government and the recognition that the Constitution and laws of the United States would, under the Supremacy Clause, override state law. Flowing from that surrender of substantive legislative power, there was a surrender of sovereignty to the extent that States might be subjected to suit to enforce "supreme" federal law (*see Ex parte Young*, 209 U.S. 123 (1908)), particularly where Congress declares such suit necessary to sustain some federal power under the Necessary and Proper Clause. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Hoffman v. Connecticut*, 492 U.S. 95, 111 (1989); *see also* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

<sup>12</sup> The tendency to refer to the sovereign immunity of the States as jurisdictional is compounded by the jurisdictional character of

is perfectly appropriate to treat sovereign immunity in this way, especially where doing so invests it with the procedural preeminence associated with jurisdictional defenses, *e.g.*, that the defense may not be inadvertently waived and ought to be addressed as a matter of first priority as this Court has generally done. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945).

But the Court has never lost sight of the fact that state sovereign immunity was not born as a limitation on the grant of power to the federal courts, but rather had its genesis in antecedent notions of sovereignty. State sovereign immunity "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *See Union Gas*, 491 U.S. at 32 (Scalia, J., concurring in part and dissenting in part). The States brought their sovereignty with them to the Union they formed; it was not granted to them by the Constitution. Moreover, sovereign immunity, as the term implies, is an attribute of that sovereignty; it was not fashioned by limiting the jurisdiction of the federal courts. Therefore, the fact that sovereign immunity may, for some purposes, be described as "jurisdictional" undermines neither its deeper historical roots nor its broader meaning.<sup>13</sup>

the Eleventh Amendment itself, and by the pre-ratification debate over the effect of the grant of jurisdiction to the federal courts under Article III on the immunity of the States.

<sup>13</sup> Simply because the immunity "partakes of the nature of a jurisdictional bar," and therefore might, in some circumstances, be raised for the first time on appeal, *see Edelman*, 415 U.S. at 678, does not require that it be considered a mere jurisdictional defense for all purposes. Indeed, if sovereign immunity were a true limitation on the constitutional subject matter jurisdiction of the federal courts, the States presumably could not waive it. *See Employees*, 411 U.S. at 294 n.10 (Marshall, J., concurring in the result) (describing the permitted waiver of a jurisdictional limitation as "anomalous").

The "essence" of a claimed right (*Van Cauwenberghe*, 486 U.S. at 524) is to be found in the way that the right is commonly understood.<sup>14</sup> Just as this Court's cases make it clear that sovereign immunity is something more than the "merely" jurisdictional limitation on the power of the federal courts set forth in the Eleventh Amendment, those cases likewise reflect the understanding that under the American system of jurisprudence, sovereign immunity is primarily regarded as a right, possessed by the sovereign, not to be haled before a court at all—a right not to be sued or compelled to stand trial.<sup>15</sup>

Thus, the Court has referred to sovereign immunity as "an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). It has been described as arising from the problems "inherent in making one sovereign appear against its will in the courts of the other." *Employees*, 411 U.S. at 294 (Marshall, J., concurring in the result). The Court's formulation echoes that of the Framers. James Madison expressed the principle of sovereign immunity in these terms: "It is not in the power of individuals to call any state into court." 3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed. 1836) [hereinafter cited as *Elliot's Debates*]. Similarly, Alexander Hamilton put it this way: "It is inherent in the nature of sovereignty not

<sup>14</sup> This is not simply a matter of "characterization" (*see Mitchell v. Forsyth*, 472 U.S. at 551 (Brennan, J., concurring)), but rather of the accepted understanding of the nature of the right.

<sup>15</sup> *Amici* are aware of the suggestion of various commentators that sovereign immunity is largely a modern creation and did not exist at old common law. But that academic theory only serves to emphasize the importance of the judicial understanding of state sovereign immunity. In the face of what the American courts have long understood the right of sovereign immunity to entail, a historical analysis which suggests that sovereign immunity *should have been* understood to mean something else counts for little.

to be amenable to the suit of an individual without its consent." *The Federalist* No. 81, at 487 (C. Rossiter ed. 1961).<sup>16</sup> At the beginning of the century, the Court described the doctrine of sovereign immunity as ensuring that "[w]ithout [a State's] consent it *cannot be sued* in any court, by any person, for any cause of action whatever." *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 641 (1911) (emphasis added). And specifically with respect to Puerto Rico, the Court has described sovereign immunity as a "general rule exempting a government sovereign . . . from *being sued* without its consent." *Porto Rico v. Rosaly*, 227 U.S. at 273 (emphasis added). What all of these formulations have in common is the notion that sovereign immunity is at its heart an immunity from suit.<sup>17</sup>

<sup>16</sup> Those schooled in the doctrine of sovereign immunity found it difficult to conceive of a State appearing in court as some ordinary litigant. This puzzlement is exemplified by the statement of George Mason, speaking at the Virginia convention, who protested:

Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject further. What is to be done if a judgment be obtained against a state? Will you issue a *fiery facias*? It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted.

3 *Elliot's Debates* 527.

<sup>17</sup> The States' sovereign immunity from suit in federal court is merely an extension of their more general immunity from suit in any forum. Therefore, sovereign immunity is, at bottom, a matter of the State's prerogative not to be sued at all. It is accordingly not merely a right not to be sued in a particular forum. *Cf. Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 501 (1989) (denial of motion to dismiss based on contractual forum selection clause is not immediately appealable). The fact that a State may *voluntarily* elect to allow the suit to be prosecuted in its own courts does not change the fact that a claim of sovereign immunity is, in essence, a claim of entitlement not to be sued anywhere. *But cf. Nevada v. Hall*, 440 U.S. 410, 421 (1979) (Constitution does not require that courts of one sovereign State respect immunity of sister State).

In sum, it is more accurate to say that the federal courts lack the power to treat the States as ordinary litigants because the States retained a preexisting sovereign immunity than it is to say that state immunity is a function of the limited jurisdiction granted the federal courts. Sovereign immunity is not an attribute of a particular court system, but rather an attribute of a governmental defendant, the "essence" of which is a right not to be sued. To the extent the Court has sometimes described sovereign immunity as a limit on federal court jurisdiction, that should not obscure its "essence" as an immunity from trial, for the Court has described it as jurisdictional only to elevate it, not to diminish it.

## 2. *The States' Partial Surrender Of Immunity Does Not Change The Nature Of The Immunity That Is Retained*

The First Circuit in *Libby* concluded that the general understanding that state sovereign immunity is an immunity from trial overlooks "the reality of the *Ex parte Young* exception to the Eleventh Amendment." The First Circuit observed that a State can effectively be compelled to stand trial when suit is brought under federal law for injunctive relief against a state official acting in his official capacity.<sup>18</sup> In light of that principle—the principle of *Ex parte Young*—the court of appeals felt that it "cannot be convincingly argued that the entitlement possessed by the state under the Eleventh Amendment is an entitlement not to stand trial." 833 F.2d at 406. Instead, "the damage the Eleventh Amendment seeks to forestall is that of the State's fisc being subjected to a judgment for compensatory relief." *Id.* This view of the Eleventh Amendment as primarily a protection of the State's treasury from damages awards

<sup>18</sup> Although the premise of *Ex parte Young* is that the suit is not in fact brought against the State but rather against an officer, in practical effect it is a suit against the State. *But cf. Cory v. White*, 457 U.S. 85, 90-91 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought.").

misconceives the origins of the sovereign immunity doctrine and the nature of the *Ex parte Young* exception.<sup>19</sup>

The *Ex parte Young* principle is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). See *Pennhurst*, 465 U.S. at 102 (*Ex parte Young* allows federal courts to hold the States accountable to "supreme authority of the United States"); *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution."). It rests on premises very similar to the premises that support the various other circumstances in which a State may be called upon to defend an action in federal court, e.g., when it is sued by another State or by the United States,<sup>20</sup> or when

<sup>19</sup> We have no doubt that a State also has an interest in avoidance of damages and that the State's sovereign immunity guards that interest as well as the State's interest in avoiding trial. But the existence of such a dual interest is obviously not dispositive under the collateral order doctrine. For example, a defendant with a meritorious double jeopardy defense has an entitlement not to be punished twice for the same offense and an entitlement not to be placed twice in jeopardy. A post-trial appeal may effectively protect the defendant from being twice punished, but it is unavailing in preventing him from being placed twice in jeopardy.

<sup>20</sup> The Court has reasoned that the United States may sue States in federal court because, absent this authority, the "permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329 (quoting *United States v. Texas*, 143 U.S. 621, 645 (1892)). Likewise, States may sue other States in a federal forum because "[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States . . . was essential to the peace of the Union." *Id.* at 328.

The former limitation on state sovereign immunity reflects the supremacy of the United States under the federal system and its obligation to preserve the stability of the Union. The latter confirms the coequal status of the sister States and the need for a forum to resolve disputes among charter members of the Nation.

Congress, by "unmistakably clear" statutory language, has declared its intention to abrogate state immunity in order to implement supreme federal law.<sup>21</sup>

What each of these limitations on sovereign immunity has in common is that the surrender of the State's sovereign immunity may fairly be inferred—just as the State's retention of sovereign immunity may be inferred—from "the plan of the convention."<sup>22</sup> *Blatchford v. Native Village of Noatak*, 111 S. Ct. at 2581. See also *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. at 487 (plurality opinion). This Court has never found the surrender of sovereignty to be broader

<sup>21</sup> Congress may create a cause of action against a State and provide for its presumptive enforcement in state courts or, when necessary and proper, in the federal courts. See *Union Gas*, 491 U.S. at 14-24.

The States expressly granted a superseding legislative authority only to Congress. Because abrogation of sovereign immunity may "upset[] the fundamental constitutional balance between the Federal Government and the States," *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985)), it is appropriate that the Court guard against judicial or executive overreaching by insisting that such abrogation be found only when Congress itself has made its intention "unmistakably clear" in the text of the statute. *Atascadero*, 473 U.S. at 242. See also *Welch*, 483 U.S. at 474 (plurality opinion).

<sup>22</sup> The understanding that the immunity of the States would be abrogated in part is also reflected in the statements of the Framers. State sovereign immunity, unlike the immunity of kings, was subject to the will of the people working through the democratic process:

[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.

*The Federalist* No. 45, at 289 (J. Madison). The balance that this Court has struck in describing the continued existence of state sovereignty, except as necessary to reflect the plan of the convention, reflects this fundamental, democratic principle. Indeed, even the recognition that state sovereign immunity may be overridden by the people of the State (through a State's waiver of its sovereign immunity), or by Congress under the "unmistakable intention" rule, reflects this basic sense of the constitutional plan.

than that compelled by the language of the Constitution—notably the Supremacy Clause and the broad grant of legislative authority to Congress—and the necessities of a peaceful and well-functioning Union. More to the present point, recognition that the States necessarily surrendered some portion of their sovereign immunity in joining the Union does not change the character of what they retained. As explained above, part of what they retained has always been understood as an immunity *from suit*.

In applying the “collateral order” doctrine, this Court has never suggested that the immunity being asserted by the defendant must apply to save the defendant from litigation in all cases, at all times. In *Mitchell*, this Court took pains to describe the qualified immunity as “an entitlement not to stand trial *under certain circumstances*.” 472 U.S. at 525. The qualified immunity at issue in *Mitchell*, and the absolute immunity found in *Nixon*, were both described as immunities from being asked to answer a claim of *damages*, as here. In a proper circumstance, there was little question that a suit might be brought against the same defendant for injunctive relief. Where the qualified immunity defense was not proven, even the very same defendant in *Mitchell* could have been held answerable in damages. Thus, those cases do not support the distinction drawn by the First Circuit in *Libby* based on the “reality” that under *Ex parte Young* a State might be subjected to suit in federal court on a federal claim for injunctive relief. It is sufficient answer to say that the States’ immunity, to the extent retained, continues to reflect the principle that a State ought not to be haled into court against its will.

#### **B. A Claim Of Sovereign Immunity Easily Satisfies The Remaining Requirements Of The Collateral Order Doctrine**

There is little question that the Authority’s claim of sovereign immunity satisfies the two additional criteria required for a district court decision to be deemed an appealable collateral order.

*First*, the decision must be one that conclusively determines the disputed question. *Mitchell*, 472 U.S. at 527. The denial of the Authority’s motion easily meets this test. The issue was addressed and resolved as a question of law. The district court did not suggest that any further fact-finding was required or would be entertained on the issue.<sup>23</sup> Thus, the court conclusively rejected the claim of sovereign immunity on the merits.

*Second*, the question must be “an important issue completely separate from the merits.” *Coopers & Lybrand*, 437 U.S. at 468. These requirements are also easily satisfied here.<sup>24</sup> Under the *Abney* line of cases, the Court has acknowledged that to determine separateness it will, at a minimum, be necessary to examine the allegations and the underlying facts in order to resolve the issues presented by defendant’s claim—whether in connection with a double jeopardy claim or a claim of immunity. *See Mitchell*, 472 U.S. at 528-29. It is sufficient, however, that the issue raised by the defendant’s claim is “conceptually distinct” from the merits, *id.* at 527-28, so that there is no need to “consider the correctness of the plaintiff’s version of the facts, nor even determine whether the plaintiff’s allegations actually state a claim.” *Id.* To the extent that a given claim of sovereign immunity might, on occasion, compel the court to peek at the merits—to determine, for example, who were the contracting parties, or the scope of an express waiver that was limited to certain causes of action—that exercise would be similar to the kind con-

<sup>23</sup> Respondent’s theory in its opposition to the petition—that the court of appeals lacked jurisdiction over the appeal because there were factual issues to be determined—is without merit. The district court issued a conclusive ruling, purporting to resolve the issue as a matter of law. It indicated no need for further fact-finding. Thus, the court of appeals had jurisdiction over the district court’s order. The court of appeals may of course ultimately find a need for further factual determinations, but that would not affect the appealability of the underlying order.

<sup>24</sup> The requirement that the issue be “important” is discussed in the next section.

ducted in resolving double jeopardy claims or the immunity claims of government officials.

There will certainly be situations that require a district court to exercise its discretion in deciding the most appropriate way and time to resolve a question of sovereign immunity. The need for the district court to exercise judgment will be particularly clear where determination of some issue of fact is a predicate to a successful sovereign immunity claim.<sup>25</sup> Until a factual determination necessary to the resolution of the sovereign immunity question is made, a claim of immunity plainly is not ripe for appellate review. We may assume that the district court possesses the inherent discretion to determine whether, for example, a factual issue bearing on immunity is sufficiently distinct from the merits that it can be addressed in a separate hearing, or can best be resolved at trial. Because sovereign immunity "partakes of the nature of a jurisdictional bar" (*see Edelman v. Jordan*, 415 U.S. at 678), however, the presumption ought to be, in every instance, that the district court will resolve the issue as expeditiously as possible, even if a separate fact hearing addressed to the issue may, on occasion, be required.<sup>26</sup>

<sup>25</sup> Although sovereign immunity typically focuses on a characteristic of the defendant rather than on the facts underlying the particular controversy giving rise to the suit, there may be circumstances where the sovereign immunity question presents factual issues intertwined with the merits. Therefore, there may be situations in which the district court might find it appropriate to reserve decision on the immunity question until after a hearing or even, in rare circumstances, after trial.

In addition, a district court undoubtedly possesses discretion to deny a motion for summary judgment—without making a final determination—if the court finds that the parties' submissions are not sufficient to decide the issue.

Whether such orders would be immediately reviewable is obviously not a question at issue here.

<sup>26</sup> There is no need here to address the question whether denial of a colorable claim of sovereign immunity from damages would be appealable when coupled in the case with a claim for injunctive relief

### C. Sovereign Immunity Is Important

In *Cohen* and *Coopers*, the Court stated that the order being appealed from must resolve an "important issue." *See Cohen*, 337 U.S. at 546; *Coopers*, 437 U.S. at 468. *See also Lauro Lines S.R.L. v. Chasser*, 490 U.S. at 502-03 (Scalia, J., concurring). To the extent there is a separate "importance" requirement—distinct from the importance of the issue to the case and to the individual defendant—it clearly is satisfied in connection with a claim of sovereign immunity. Sovereign immunity has its roots in comity between nations and in the fundamental respect that one government owes another. Within our constitutional system, respect for the sovereignty of the States was retained as part and parcel of the structural fabric of the Union which they formed. Because that sovereign immunity was implicit in the constitutional compact, it is fairly described as "constitutionally secured" or "guaranteed." *E.g., Dellmuth v. Muth*, 491 U.S. at 227-28; *Quern v. Jordan*, 440 U.S. 332, 342 (1979). *See also Blatchford*, 111 S. Ct. at 2585 (immunity is an "essential component of our constitutional structure"); *Pennhurst*, 465 U.S. at 100 (The Court has stressed "that abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,' placing a considerable strain on '[t]he principles of federalism that inform Eleventh Amendment doctrine.'" (citation omitted)).<sup>27</sup>

The States' surrender of some of their sovereignty in forming the Union does not detract from the importance of what they retained. Because of the large grant of authority to Congress and to the federal courts, preserva-

arising out of the same facts. In those circumstances, it would be difficult to argue that disposition of the sovereign immunity question would avoid a trial on the merits.

<sup>27</sup> *Cf. Midland*, 489 U.S. at 801 (suggesting that the type of claim, in a criminal case, which can give rise to a right not to stand trial in the *Abney* sense must be of constitutional or clear statutory origin).

tion of state sovereignty within the federal system is a matter of utmost sensitivity. See *Gregory v. Ashcroft*, 111 S. Ct. at 2400. Thus, the State's interest in preserving its constitutional immunity is "important". To the extent that a State's interest in having its claim of sovereign immunity finally resolved before, rather than after, trial can comfortably be accommodated within the framework of the grant of appellate jurisdiction under § 1291, the Court should make that accommodation.<sup>28</sup>

## II. THE ISSUE OF SOVEREIGN IMMUNITY PRESENTED HERE IS SUBSTANTIAL

As demonstrated above, a claim of sovereign immunity easily satisfies the criteria established by this Court for determining whether an appeal of a collateral order will be allowed. Nonetheless, before addressing the appealability of the order denying absolute immunity in *Nixon*, the Court appeared to examine whether the claim presented was "substantial" (specifically, "serious and unsettled") in a jurisdictional sense. 457 U.S. at 742-43. In this case, there is no occasion for this Court to address the "substantiality" of the Authority's immunity claim. It was not relied upon by the court below; it was not squarely presented by the petition; and it is unlikely to be fully addressed by the parties.<sup>29</sup>

<sup>28</sup> The only factors that arguably militate against the straightforward application of these principles are those that militate against interlocutory appeals generally. There is no question but that interlocutory appeals create a burden on the courts. Nonetheless, where the three-part test is satisfied, and the issue is "important," the Court has made the determination that an appeal should be allowed.

<sup>29</sup> For this Court to consider the merits of the immunity argument in the first instance would place the Court in the position of addressing novel issues of constitutional and statutory law involving the sovereign status of Puerto Rico generally (see *Examining Bd.*, 426 U.S. at 580-97), in connection with a petition that, on its face, presented only a question of statutory appellate jurisdiction. See generally *Yee v. City of Escondido*, 60 U.S.L.W. 4301, 4305 (U.S. Apr. 1, 1992) (declining to reach issues neither "raised or addressed below" or "fairly included in the question" presented).

Moreover, "substantiality" ought not ordinarily to be part of the jurisdictional equation for the courts of appeals. A determination of lack of substantiality, sufficient to warrant dismissal for lack of jurisdiction, necessarily involves a judgment on the substantive merits of the claim. It is anomalous to treat a decisive ruling on the merits as part of the question of jurisdiction.

Insubstantial claims of sovereign immunity can and should be disposed of by the courts of appeals without resort to the notion that the presentation of an insubstantial claim of immunity is a jurisdictional defect. For example, the courts of appeals have developed procedures for the summary disposition of appeals that raise frivolous claims. Similarly, an appeal that is premature because the question of sovereign immunity has not been finally determined by the district court may be dismissed on motion.<sup>30</sup>

Because of the disruption to trial court proceedings wrought by an improperly filed interlocutory appeal, the courts of appeals may be expected to take such motions to dismiss or for summary disposition seriously. The courts of appeals possess the tools to ensure that implausible appeals do not long burden their dockets. On the other hand, because of the disruption to trial court schedules created even by colorable interlocutory appeals, it may be appropriate to afford a calendar priority to all such appeals, irrespective of their "substantiality."

Were the Court to reach the substantiality of the Authority's claim of immunity in this case, it is sufficient to note that this Court has properly recognized that the government established in Puerto Rico in 1900 "is of such a nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Porto Rico v. Rosaly*, 227 U.S. at

<sup>30</sup> On the other hand, the lack of a colorable basis for the claim may affect the determination whether a notice of appeal divests the district court of jurisdiction.

273. The Court's more recent cases, addressing subsequent statutory development with respect to the Commonwealth of Puerto Rico, have tended to confirm Congress's intention to afford the Commonwealth much the same degree of sovereignty as a State. See *Examining Board*, 426 U.S. at 593-94; *Calero-Toledo*, 416 U.S. at 671-73. Moreover, the First Circuit has long held that Puerto Rico is entitled to "Eleventh Amendment immunity," just as is a State. See *DeLeon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991); see also *Toa Baja Dev. Corp. v. Garcia Santiago*, 312 F. Supp. 899 (D.P.R. 1970) (holding that the Commonwealth's sovereign immunity parallels the immunity of a State).<sup>31</sup> With respect to the Authority's entitlement to share in that immunity, it is sufficient that the Authority is a public corporation, which operates as an "autonomous government instrumentality of the Commonwealth," and which is engaged in "an essential government function." P.R. Laws Ann. tit. 22 § 142. Thus, the Authority's claim is, at a minimum, colorable, and its position as an arm of the Commonwealth should entitle it to the modicum of respect associated with entertaining its appeal on the merits.

<sup>31</sup> Although the First Circuit has, in dictum, expressed skepticism about the Authority's claim that it shares in the Commonwealth's immunity (*Paul N. Howard Co.*, 744 F.2d at 886), that court has not decided the issue and has not applied to the Authority its most recent formulation for determining the immunity of the Commonwealth's public corporations (*Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034 (1st Cir. 1987)).

We can assume that where a court of appeals has previously decided the question of a particular instrumentality's immunity from suit, then an appeal which does no more than reargue the correctness of the prior holding in the context of a new case—absent some intervening change in the case law or state statute—might be summarily dismissed. That, however, is obviously not the case here.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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May 7, 1992